STATE OF MICHIGAN

COURT OF APPEALS

LINDA HURD,

Plaintiff-Appellant,

v

FRANKLIN VILLAGE TOWNHOUSE CONDOMINIUM ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
March 22, 2011

No. 294563
Oakland Circuit Court
LC No. 2008-095991-NO

Before: K. F. KELLY, P.J., AND GLEICHER AND STEPHENS, JJ.

PER CURIAM.

In this slip and fall negligence action, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant under MCR 2.116 (C)(10), after concluding that there was no genuine issue of material fact. We affirm.

On appeal, plaintiff asserts two arguments. First, the common law open and obvious doctrine does not apply because the Condominium Act, MCL 559.101 *et seq*., and defendant's bylaws, which are governed by the Condominium Act, impose upon defendant a statutory duty of care. Second, a jury could reasonably find that defendant breached its duty to maintain the common areas by failing to inspect the condominium complex roadways for ice and to have the snow subcontractor remove the snow and apply salt after several days of weather giving rise to snow and ice. We disagree with both arguments.

We review a trial court's decision on a motion for summary disposition de novo. *Healing Place at North Oakland Medical Center v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007), citing *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). A motion for summary disposition should be granted when no genuine issue of material fact exists "and the moving party is entitled to judgment as a matter of law." *Healing Place*, 277 Mich App at 56. "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Id*., citing *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Plaintiff first argues that the common law open and obvious doctrine is inapplicable in this case because her claim is governed by the condominium association's documents, and, by extension, the Condominium Act, MCL 559.101 *et seq*., which she contends imposes a statutory duty upon defendant, a condominium association, to maintain the common elements within its

complex, which includes driveways. Plaintiff cites the cases of *Allison v AEW Capital Management, LLP*, 481 Mich 419; 751 NW2d 8 (2008), and *Jones v Enertel*, 467 Mich 266; 650 NW2d 334 (2002) in support of her argument. In *Allison*, the Michigan Supreme Court noted that "a defendant cannot use the 'open and obvious' danger doctrine to avoid liability when the defendant has a statutory duty to maintain the premises in accordance with MCL 554.139(1)(a) or (b)."[1] *Id*. at 425 n 2 (citation omitted). Similarly, in *Jones*, the Supreme Court held that the open and obvious doctrine was not applicable when MCL 691.1402(1)[2] imposed a statutory duty of care upon the defendant municipality. *Jones*, 467 Mich at 270. Additionally, plaintiff argues that, because the Condominium Act and condominium association's documents give her an undivided right to use the common areas of the complex, her status is not that of an invitee, licensee, or tenant under premises liability law. Instead, her status is defined and governed by the Condominium Act and the condominium association's documents.

However, plaintiff points to no provision of the Condominium Act that imposes any duty upon defendant to maintain common areas. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854, 856 (2003), citing *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Therefore, plaintiff's reliance on the *Allison* case is misplaced because, unlike the statute that imposed a duty of care upon lessors of residential premises in *Allison*, plaintiff has not demonstrated that the Condominium Act imposes a statutory duty on defendant in this case.[3] Similarly, plaintiff's reliance on *Jones* is unfounded because in *Jones*, a statutory duty of care was imposed upon municipalities by MCL 691.1402(1), whereas in this case, plaintiff fails to demonstrate any imposition of a statutory duty of care upon defendant. In the absence of a statutory duty of care imposed on defendant, the common law duty of care imposed by premises liability law comprises the duty owed by the association to plaintiff. As a result, the common law open and obvious doctrine is applicable in this case.

Similarly, plaintiff's argument that the condominium bylaws, by extension to the Condominium Act, impose a statutory duty of care upon defendant is also not persuasive. While

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[1] MCL 554.139 provides that "[i]n every lease or license of residential premises, the lessor or licensor covenants: (a) That the premises and all common areas are fit for the use intended by the parties[;] (b) To keep the premises in reasonable repair during the term of the lease or license. . . ."

[2] MCL 691.1402(1) provides that "each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency."

[3] Plaintiff had previously raised a claim under MCL 554.139, as well as MCL 554.663, but has conceded that these statutes are inapplicable because plaintiff is a condominium owner, not a lessee, and defendant is not her landlord.

the Condominium Act provides that bylaws are mandatory, MCL 559.153,[4] bylaws are not statutes created by the Legislature, but are instead rules promulgated by the association that govern the rights and duties of the association and the owners. Therefore, condominium bylaws by themselves cannot impose a statutory duty. Additionally, plaintiff's argument that the bylaws purport to be governed by the Condominium Act, and by extension to the statute impose a statutory duty of care upon defendant is similarly unpersuasive because, as noted above, plaintiff has not demonstrated that the Condominium Act imposes such a duty.

Plaintiff next argues that defendant's failure to inspect the condominium premises and to instruct the snow subcontractor to remove the snow and ice constituted a breach of defendant's duty of care, and that the resulting icy conditions created an unreasonably hazardous condition. According to plaintiff, the open and obvious doctrine does not apply to this negligence claim, leaving plaintiff's comparative fault to be determined by a jury. Contrarily, defendant argues that it had no duty to warn plaintiff or, or protect her from, the hazard posed by the ice because such hazard was open and obvious. We agree with defendant.

"Whether a defendant may properly rely on the defense of open and obvious danger depends on the theory of liability at issue." *Laier v Kitchen*, 266 Mich App 482, 489; 702 NW2d 199 (2005). Although plaintiff asserts that her claims sound in negligence and not premises liability, she has pleaded the claim as arising from a breach of duty in allowing a dangerous condition to exist on the condominium premises. Because defendant's alleged liability derives solely from its duty to maintain the land, we apply premises liability law to plaintiff's claims. An invitor has a duty to exercise reasonable care to protect invitees "from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, this duty does not require removal of dangers that are open and obvious. *Id*. Additionally, "an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id*., quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a danger is open and obvious depends on whether an average person with ordinary intelligence would have been able to discover the danger upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). The test is objective, and does not consider whether a plaintiff knew or should have known of the risk. *Id*. However, if a special aspect of an open and obvious condition exists that makes the condition unavoidable or unreasonably dangerous, the invitor has a duty to protect invitees from the unreasonable danger, despite its open and obvious nature. *Lugo*, 464 Mich at 517-18.

In this case, plaintiff's deposition testimony establishes that the ice upon which she slipped was discoverable upon casual inspection by a person of ordinary intelligence, and, therefore, open and obvious. In her deposition, plaintiff declared on several occasions that she could see the ice, but on one occasion noted that the ice was hard to see because the asphalt was

[4] According to MCL 559.153, "The administration of a condominium project shall be governed by bylaws recorded as part of the master deed, or as provided in the master deed."

black. In response to the question of whether the ice was obvious, plaintiff unequivocally answered that it was obvious. Plaintiff also testified that she wore shoes with rubber soles and treads, and walked flatfooted to avoid slipping. Furthermore, on one occasion, plaintiff admitted that she could see that the roads had been salted. The snow and ice conditions testified to by plaintiff demonstrate that a person of average intelligence would have discovered ice on the roads and driveways upon casual inspection.

Concerning plaintiff's argument regarding comparative fault, according to the Michigan Supreme Court, in common law negligence cases, "[i]t is fundamental tort law that before a defendant can be found to have been negligent, it must first be determined that the defendant owed a legal duty to the plaintiff." *Riddle*, 440 Mich at 99. Similarly, the open and obvious doctrine "attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Id.* at 96. Therefore, because application of the open and obvious doctrine negates defendant's duty to warn or protect plaintiff from the hazard posed by the ice, plaintiff's argument concerning the centrality of the comparative fault issue in this case is unavailing.

There is no genuine issue of material fact as to whether the ice upon which plaintiff slipped and fell was open and obvious. Therefore, there is no genuine issue of material fact as to whether defendant had or breached a duty to warn plaintiff of, or protect her from, the danger posed by the ice. Consequently, defendant was entitled to judgment as a matter of law and the trial court properly granted summary disposition pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens